

**UNITED STATES DISTRICT COURT  
DISTRICT OF MASSACHUSETTS**

IN RE: PHARMACEUTICAL INDUSTRY  
AVERAGE WHOLESALE PRICE  
LITIGATION

MDL No. 1456

C.A. No.: 01-CV-12257-PBS

THIS DOCUMENT RELATES TO  
ALL CLASS ACTIONS

Judge Patti B. Saris

**WATSON PHARMACEUTICALS, INC.'S RESPONSE TO CLASS  
PLAINTIFFS' RESPONSE TO AMGEN AND WATSON'S  
SUPPLEMENTAL OPPOSITION TO CLASS CERTIFICATION**

Exhibit 7: Excerpts from Deposition of Thomas M. Scully  
(May 15, 2007).

1 UNITED STATES DISTRICT COURT

2 FOR THE DISTRICT OF MASSACHUSETTS

4 IN RE: PHARMACEUTICAL : MDL NO. 1456

5 INDUSTRY AVERAGE WHOLESALE : CIVIL ACTION

## 6 PRICE LITIGATION :

7 THIS DOCUMENT RELATES TO :

8 U.S. ex rel. Ven-a-Care of : Judge Patti B. Saris

9 the Florida Keys, Inc. :

11 Abbott Laboratories, Inc., : Chief Magistrate

12 No. 06-CV-11337-PBS : Judge Marianne B.

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1 Videotaped Deposition of THOMAS A.  
2 SCULLY, a witness herein, called for examination by  
3 counsel for Abbott Laboratories in the above-entitled  
4 matter, pursuant to subpoena, the witness being duly  
5 sworn by SUSAN L. CIMINELLI, a Notary Public in and  
6 for the District of Columbia, taken at the offices of  
7 Jones Day, 51 Louisiana Avenue, Northwest,  
8 Washington, D.C., at 8:49 a.m. on Tuesday, May 15,  
9 2007, and the proceedings being taken down by  
10 Stenotype by SUSAN L. CIMINELLI, CRR, RPR, and  
11 transcribed under her direction.

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1 million, is that correct?

2 A. You could have a very rational policy  
3 debate about what the appropriate level was, but I  
4 would say the 5 to 600 million clearly represented --  
5 a large chunk of that was politics.

6 Q. And so that we are clear, what we are  
7 talking about is that under the MMA, when it went  
8 into effect, drug reimbursement was reduced by a  
9 certain amount, and at the same time, service fees to  
10 providers were increased, correct?

11 A. Yes.

12 Q. And the increase on the service fees to  
13 providers was in the range of 500 to \$600 million?

14 MR. GOBENA: Object to the form.

15 BY MR. DALY:

16 Q. Is that right?

17 MR. GOBENA: Mischaracterizes the  
18 witness's testimony.

19 THE WITNESS: Yes. In the RUC, or in the  
20 normal process of roughly \$70 million of Part B  
21 payments, if you're going to raise oncologists, you  
22 have to cut somebody else. It's a budget neutral

1 pot, so what Congress did in this debate was they  
2 significantly reduced AWP for drugs for oncology and  
3 they took some of that money, I think it was roughly  
4 a billion a year in savings, put some of the money,  
5 put it back into a nonbudget neutral add-on just for  
6 mostly oncologists, some of it was rheumatology,  
7 there was probably four -- there were other practice  
8 areas that were affected as well -- back in to  
9 restore some of their revenues.

10 But it was probably some of that was a  
11 political push because obviously the bill was  
12 controversial for totally other reasons. And  
13 Congress, with an intense group of opposition from  
14 lawyers and oncologists, this was a controversial  
15 issue. This was a side show for the Medicare Part B  
16 prescription drug bill, but we were able to pass both  
17 bills by one vote in both houses of Congress, got  
18 very contentious and so the loud group of screaming  
19 people about this particular provision theoretically  
20 could have held up the whole bill. So we added back  
21 in more than I think most people thought was  
22 justified in the end.

1                   You could pick a number anywhere from 50  
2                   million up to probably 600 and justify it, but the  
3                   savings, the total savings was over a billion I think  
4                   in the first year. And on the other side, dialysis,  
5                   Congress very consciously, because dialysis really  
6                   did have bad margins, whereas I would argue  
7                   oncologists did not, or rheumatologists, dollar for  
8                   dollar, Congress instructed the agency from AWP  
9                   savings on dialysis dollar for dollar every dollar  
10                  that came out went back into a drug add-on. Dollar  
11                  for dollar, there were no savings. There were they  
12                  conscious savings on the oncology side.

13                  So Congress clearly had the intention of  
14                  saving a lot of money on drugs which I would -- not  
15                  even an argument. It was clear that there was a  
16                  massive overspending on drugs versus any arguable  
17                  underpayment for services in oncology.

18                  In dialysis, I would say the argument  
19                  wasn't made as thoroughly, but in dialysis we made  
20                  conscious -- or Congress, Chairman Thomas and  
21                  Grassley and Baucus made a conscious decision to take  
22                  every dollar out and put it back in, so dialysis --

1 because dialysis had very low to no Medicare margins,  
2 whereas I don't believe it was as credible an  
3 argument -- or any credible argument on oncology or  
4 rheumatology or others.

5 BY MR. DALY:

6 Q. All right. So I just wanted to pick up on  
7 something you said. In terms of oncology, you said I  
8 don't believe it was as credible an or any credible  
9 argument on oncology or rheumatology, is that what  
10 you said?

11 A. I would say that there was not an  
12 argument. There was on dialysis, dialysis had a  
13 fairly good argument that their margins were  
14 negligible in Medicare. And if you took away their  
15 margins on drugs, that they had no margin on Medicare  
16 patients unless it was added back in, dollar for  
17 dollar. I do not think that was a credible argument  
18 with oncology or rheumatology.

19 Q. In other words, oncology in your view  
20 didn't have a dollar for dollar argument, but they  
21 had an argument that they were underpaid some amount  
22 on the service side of the equation, right?

1 the prices at which we purchase a drug and the  
2 average wholesale price of the drug." Do you see  
3 that language?

4 A. Yes.

5 Q. And do you have an understanding that that  
6 is a correct statement?

7 MR. GOBENA: Objection to form.

8 THE WITNESS: Yes. I mean, I think the  
9 issue is a matter of proportion. It's similar to the  
10 oncologists, which is they clearly made money on the  
11 spread and how much of that -- what measurement  
12 appropriately should have been paid to deliver the  
13 service, some portion of it. I don't know enough  
14 about the nursing home issue here to know how much  
15 there was. This is a small -- you know, nursing  
16 homes are similar to home infusion, where they have  
17 Part B Medicare patients in the home, and they  
18 provide the service and they get paid for it.

19 So how much did they make on AWP spread  
20 and how much of that would have measurably been put  
21 back in if they had a more rational policy into a  
22 servicing fee? I'm not sure, but my guess is much

1 like oncology, it probably wouldn't be all of it.

2 And I don't have all the facts to tell you that. I  
3 mean, I did know on the dialysis side, it probably  
4 was appropriate to put all of it back in. In many  
5 other settings, it was not.

6 BY MR. DALY:

7 Q. I'm going to hand you what's been  
8 previously marked as Exhibit Abbott 018, which  
9 is testimony that was submitted at the hearing that  
10 we've been talking about on October 3, 2002 that you  
11 attended by the National Alliance for Infusion  
12 Therapy and the National Home Infusion Association.  
13 And do you recall the presentation that these  
14 entities made at the hearing on 10-3-02?

15 A. No. I'm sure I wasn't there.

16 Q. Well, you were there for your part. This  
17 is the same hearing you were at.

18 A. I traditionally left as soon as I was  
19 done.

20 Q. As soon as possible.

21 A. As did every other administrator.

22 Q. Now, did you ever have any meetings or